of rare qualities and of lovable nature, so that her house is remembered by all those who have visited it as a place of sunshine, he lived his life in enjoyment, as much perhaps as may fall to the lot of man in this world. It was possible in those days, "in the land where we were dreaming." He used to say that he would be willing to live a thousand years in tidewater Virginia. Fortunately for him, he did not live long enough to see the country he loved so well desolated by an unjust invasion. He died the year before the war, of gout in the stomach.

At a banquet tendered by the Bar Association to the judges of the Court of Appeals, in February, 1895, the venerable John Randolph Tucker gave his reminiscences of Virginia's judges and jurists. In describing the old General Court, he epitomized Judge Clopton as follows:

"Judge John B. Clopton was a type of the Virginia gentleman in private life, and on the bench considerate, patient and dignified. He was, though not laborious, an able and learned judge, and was a member of the great Convention of 1829–30."

THE ESSENTIALS OF A VALID MARRIAGE IN VIRGINIA.

[Continued from November Number.]

(d) *Maryland.*—In this State a common-law marriage is held not to be good.[1]

(e) *North Carolina.*—This State is frequently found among the list of those holding that only a marriage in conformity to the statute is valid, and *State* v. *Samuel*[2] is cited to sustain the proposition. Mr.

[1] In *Dennison* v. *Dennison*, 35 Md. 361, Judge Alvey says:

"We think we are safe in saying that there never has been a time in the history of the State, whether before its independence of Great Britain, or since, when some ceremony or celebration was not deemed necessary to a valid marriage. In the early days of the province, it was not absolutely necessary that a minister of religion should officiate—a judge or magistrate could perform the ceremony—but still, in all cases, some formal celebration was required."

The Maryland statute provides that—

"*No persons within this State shall marry without a license*, as hereinafter directed, or before the names of the parties intending to marry shall be thrice published in some church, or house of religious worship, in the county where the woman resides, on three several Sundays, by some minister residing in said county, etc."

Attention is called to the negative words in the statute.

[2] 2 Dev. & Bat. 177.

Bishop points out that the question in this case was whether marriages by cohabitation among slaves were valid, and they were held not to be—the decision resting as much on the legal incapacity of slaves, as on the question of common-law marriage.

In *State* v. *Robbins*,[1] which was upon an indictment for bigamy, the defense being that the first marriage was without a license, although celebrated before a magistrate, the court held that:

"If a marriage is solemnized by a minister of the gospel, or a magistrate, without a license, though he may subject himself to a penalty, the marriage is, notwithstanding, good to every intent and purpose."

This case is cited to sustain the same proposition in *Holmes* v. *Marshall*,[2] and in *State* v. *Parker*.[3]

Mr. Bishop seems to assign this State to the list of the "doubtful."

(f) *Tennessee.*—Reference is frequently made to *Grisham* v. *State*,[4] and *Bashaw* v. *State*,[5] to sustain the proposition that common-law marriages are not considered valid in Tennessee, and that the statute is held to supersede the common-law in this respect. But Mr. Bishop includes Tennessee in the list of those not requiring the presence of a person in holy orders.[6]

(g) *Vermont.*—The court of Vermont had this question presented to it in 1829 in the case of *Newbury* v. *Brunswick*,[7] and it decided emphatically in a well-reasoned opinion that the statutes on the subject were not meant to abrogate the common-law, and were to be construed as being directory only.

The facts in that case were that Nat Harriman and Lydia Page went before a justice of the peace, in the province of Lower Canada, and there covenanted and agreed to be and remain husband and wife, and thereafter lived in that relation. In 1808 they removed from Canada to the town of Brunswick, Vermont.

It appeared that by the law of Canada a justice of the peace had no authority to perform the marriage ceremony, so that its legality

[1] 6 Iredell's Law, 23, 44 Am. Dec. 64.

[2] 72 N. C. 40.

[3] 11 S. E. 517 (N. C.).

[4] 2 Yerg. 589.

[5] 1 Yerg. 177.

[6] 1 Bishop, Mar., Div. and Sep. 413. Citing *Andrews* v. *Page*, 3 Heisk. 653; *Johnson* v. *Johnson*, 1 Cold. 626.

[7] 2 Vt. 151, 19 Am. Dec. 703.

depended upon their subsequent cohabitation. Upon the question of the acquisition of a settlement, the marriage was held to be valid.[1]

This case was invariably cited as stating the law of Vermont on the subject, and, so far as we have been able to find, was not questioned until 1895, when in the case of *Morrill* v. *Palmer*,[2] the law was stated in a *dictum*, to be otherwise.[3]

(h) *Maine.*—In this State a very harsh doctrine was laid down in the early case of *Ligonia* v. *Buxton*.[4]

The statute at that time authorized ordained ministers to solemnize marriages within the town, parish or district where they resided, when either of the parties also resided there.

The action was for necessaries furnished to Mary Brazier, a pauper, and it was agreed that her settlement was in Buxton, unless her previous marriage with Joseph Brazier was valid. This marriage had been solemnized by a minister ordained over an incorporated religious society, composed of members from different towns, the ceremony being performed at the minister's house, but neither of the parties was a resident of that town. And although there was a statute legalizing marriages by unauthorized persons, who erroneously supposed themselves to have the authority, this marriage was held to be void.[5]

[1] The Court saying:

"To marry is one of the natural rights of human nature, instituted in a state of innocence for the protection thereof, and was ordained by the great Law-giver of the universe, and not to be prohibited by man. . . . And as neither our statutes, nor that of 26 Geo. II., declares marriages void which are not consummated according to the provisions of them, no sound reason can be offered why the covenants and agreements of marriage between Harriman and Lydia Page, entered into before the justice, *per verba de presenti*, followed by cohabitation uninterrupted to the time of the order of removal, should not be deemed as valid to every intent as though made before the altar; especially as it is viewed both in this State and in England in no other light than as a civil contract."

[2] 68 Vt. 1, 33 L. R. A. 411.

[3] "Although the statute did not declare that a marriage celebrated in any other manner than the one required by the statute was void, we think such was the effect. It is clear to us that this is the proper construction to be given the statute, from the fact that marriages celebrated by the Quakers, in a mode not within the statute, were made legal; and this view is also confirmed by the fact that, by statute (now Rev. Laws, sec. 2310), marriages solemnized before a person *professing* to be a justice of the peace or a minister of the Gospel shall be valid, provided the marriage is in other respects lawful, and consummated with the belief on the part of either person that they were lawfully joined in marriage. If a common-law marriage was good, there was no necessity for such statutes. We hold, therefore, that what the learned commentator Kent calls the 'loose doctrine of the common law in relation to marriage' was never in force in this State."

[4] 2 Greenleaf, 102, 11 Am. Dec. 46 (1822).

[5] The court saying: "The legislature evidently proceeded on the idea that the marriages they were confirming were in all respects solemnized according to law,

The only irregularity in this case was that *neither of the parties resided in the town in which the minister resided,* and although it is difficult to conceive of a sane judge, with any regard for the public welfare and the interests of society, laying down such a rule, in face of the foregoing statute, still it is but a fair illustration of what we might expect in Virginia, should our marriage statutes receive a mandatory construction.

There is also a *dictum* in the case of *State* v. *Hodgskins,*[1] to the effect that a common-law marriage would not be regarded as valid in that State.

But this doctrine was somewhat qualified in 1858 by the decision in *Hiram* v. *Pierce,*[2] in which case the question was directly presented to the court as to the statutory liability of the defendant to support his infant grandson, the defense being that his son's marriage was void, since it took place before he had reached the statutory age.

The court held the marriage valid.[3]

As to the validity of common-law marriages in general, it may possibly be said that the doctrine in this State is still unsettled.

(i) *New Hampshire.*—The law upon this subject was first laid down in New Hampshire in the case of *Londonderry* v. *Chester,*[4] which was an action to recover for support furnished Sally Aiken, a pauper, alleged to be the wife of Sam Aiken. The only question was as to the validity of this marriage. The evidence was that the ceremony was performed in 1814 by Brown, who had been formerly ordained as a Presbyterian minister, but had been subsequently enjoined by the presbytery from preaching, and deprived of his charge.

The first section of the statute provided that—

"Every ordained minister of the gospel, in the county where he is settled, or hath his permanent residence, and in no other place; and every justice of the peace, in the county for which he is commissioned, and in no other place whatsoever, shall be, and are hereby, authorized and empowered to solemnize marriages between persons who may lawfully enter into that relation."

excepting in the circumstances mentioned in the preamble, viz., the want of authority, and the mistaken apprehension of the law. They surely have not intimated any intention to confirm those marriages which had been solemnized in open violation of it."

[1] 19 Me. 155, 36 Am. Dec. 742.

[2] 45 Me. 367, 71 Am. Dec. 555.

[3] Quoting from *Pardon* v. *Hervey,* 1 Gray. 119:

"In the absence of any provision of statute declaring marriages between parties of certain ages absolutely void, *all marriages regularly made, according to the common law, are valid and binding,* although had in violation of specific regulations imposed by statute."

[4] 2 N. H. 268, 9 Am. Dec. 61.

The second section provided for the publication of the intention of marriage, and the requirement of a certificate. The third section provided a punishment to be imposed upon ministers and justices for violating the statutory requirements, and another and severer punishment to be imposed upon persons who solemnize marriages not having authority, The marriage was held valid.[1]

But some doubt is cast upon this decision in *Dumbarton* v. *Franklin*.[2]

(j) *Wisconsin.*—In Wisconsin, the question appears to have come up for the first time in 1890, in the case of *Elliott* v. *Elliott*.[3] That was an action for the annulment of a marriage, which had been consummated between parties, one of whom, the plaintiff, was within the statutory age. The statute provided that—

"Every male person who shall have attained the full age of eighteen years, and every female who shall have attained the full age of fifteen years, shall be capable in law of contracting marriage, if otherwise competent."

The court held that the statute had abrogated the common-law rule that marriage might be consummated between parties of the age of fourteen and twelve, respectively.

(k) *Washington.*—It is no doubt settled that in this State a common-law marriage is not good. We are unable to ascertain the exact language of the Washington statute, but we are told in the headnote to *Re Estate of McLaughlin*[4] that the statute requires a license for a marriage, and provides that certain persons shall be authorized to perform the ceremony, and expressly provides further that a marriage shall *not be void because solemnized by a person not legally authorized to perform it, if the parties to the marriage, or either of them, believe*

[1] By the court: "None of the sections prescribe any form of solemnization, and none declare that a contract of marriage, without any solemnization, shall be void, or that it shall be void if solemnized in an irregular manner, or by a person not duly qualified."

After a discussion of marriage in general, and a review of the authorities (page 71): "There is nothing, then, in the nature of the contract of marriage, or in the nature of the solemnization of it, which require to their validity the presence and sanction of a minister duly ordained and settled within the county. . . . In addition to this, if, by a mere construction not required by the nature of the case, nor by analogy to other statutes, the innocent contracting parties were subjected to indictment for fornication, and all their issue pronounced illegitimate, the consequences would be so disastrous as alone to render doubtful the correctness of the construction."

[2] 19 N. H. 257.

[3] 10 L. R. A. 568.

[4] 4 Wash. 570, 16 L. R. A. 699 (1892).

they are lawfully married; and also that marriages solemnized before or in any religious organization or congregation, according to the ritual or form commonly practiced therein, shall be valid.

The facts in that case were that the defendant was married to one McLaughlin, by a judge of probate, in 1887. At that time she had a living husband, whom she supposed to be dead. Upon learning in 1890 that her former husband was living, she ceased to cohabit with McLaughlin and instituted proceedings against the former husband for a divorce. Obtaining the divorce in 1891, she and McLaughlin resumed their former relations as husband and wife until December, 1891, when McLaughlin died.

This suit was brought by a daughter of McLaughlin, by a former wife, contesting the right of defendant to control the appointment of the administrator, on the ground that she was not the widow of the decedent.

The court decided, after an extended review of the authorities, that the Washington statute had abrogated the common-law of marriage.[1]

(l) *Kentucky and District of Columbia.*—The statutes of both of these States contain express provisions as to how the contract of marriage shall be entered into, with *direct words of nullity,* as to any marriage not celebrated in conformity thereto.

But in Kentucky, before these express words of nullity were added, marriages valid at common law were held to be valid, though not celebrated in conformity to the then existing statute.[2]

[1] Scott, J., saying:

"Our own statutes provide how such a contract may be entered into, and the evidence thereof perpetuated. Certain persons are authorized to perform the ceremony, and it is also provided that if it be performed before an unauthorized person, the validity thereof shall not be questioned, if such marriage be consummated with a belief of the persons so married, or either of them, that they have been lawfully joined in marriage. It is also provided that 'all marriages to which there are no legal impediments, solemnized before or in any religious organization or congregation, according to the established ritual or form commonly practiced therein are valid.' *It is clear that in making provisions for these excepted cases the legislature was of the opinion that all attempts to establish the relationship, other than in accordance with the ways provided by statute, would be void, and would be so held.*"

This case was followed in the same year by *Follansbee* v. *Wilbur* (Wash.), 44 Pac. 262; and in 1896 by *Re Smith's Estate* (Wash.), 30 Pac. 1059.

[2] *Dumaresley* v. *Fishley,* 3 A. K. Marshall, 1198; *Donelly* v. *Donelly,* 8. B. Monroe, 113. In *Dumaresley* v. *Fishley,* the action was for slanderous words, and the defendant pleaded that the plaintiff was his lawful wife.

It appeared that sometime previous to the commencement of the suit, a license for the marriage of the plaintiff and defendant had been issued by the clerk of the court of Jefferson county, Ky., and that the ceremony was performed in Indiana. The marriage, then, was not legal according to the laws of Kentucky, because the license

(m) *California.*—In view of the existing statute in California, cases from that State, recently decided, will be of little value in our present discussion. It reads as follows:

Sec. 55. "Marriage is a personal relation arising out of a civil contract, to which the consent of the parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations."

The meaning of this statute is too plain to admit of discussion.

But the case of *Hunter* v. *Milam*,[1] declares the law in that State before the adoption of the present statute.

This was a nullity suit brought to annul a marriage entered into with the defendant in 1862, on the ground that defendant then had a living husband. Defendant admitted a marriage, celebrated in 1858, with one Joseph Milam, but alleged that it was void, because the person who performed it was unauthorized, and upon this she based her defence. The validity of the prior marriage was sustained.[2]

did not issue out of the clerk's office of the county in which the female resided, nor according to the laws of Indiana, because not issued by the proper officer of that State.

The opinion does not give the statute.

The court said:

"As the marriage was entered into in the State of Indiana, the question in relation to its validity must, no doubt, be decided by the laws of that State. Whether, however, we consider the question with reference to the laws of Indiana, or this country the results will be the same. For the statute of that country regulating marriages' . . . as to the point now in controversy, does not differ materially from the statute of this country.

"But neither the statute of Indiana, nor that of this State, avoids a marriage not celebrated according to its provisions. The object of the legislature of both States was manifestly not to declare what should be requisite to the validity of a marriage, but to provide a *legitimate* mode of solemnizing it, for the legislature speaks, not of the *validity* of the marriage, but of the celebration of its rite, and addresses itself, not to the parties themselves, but to the functionaries whom it authorizes to perform the requisite ceremonies in solemnizing the marriage. A contrary doctrine, in this country, would be attended with the most mischievous consequences."

After speaking of the numerous details of the statute, the court says further:

"A compliance with the whole of these particulars is necessary to render the marriage conformable to the statute; and a failure to comply with any one of them would render it but a marriage in fact; and if a marriage in fact be void, many of the marriages of the country would be so, for there are many in which there has been a failure, either intentionally or otherwise, to comply with some one or more of the formalities presented by the statute. A doctrine which would thus tend to vitiate a great proportion of the marriages of the country would result in incalculable evils, and cannot be admitted to be correct."

[1] (Cal.) 41 Pacific, 332 (1895).

[2] The court saying:

"The fact that a marriage ceremony was performed in this State in 1858, by a person not authorized, would not in itself invalidate the marriage if assented to by the parties, and consummated by cohabitation of the parties as husband and wife. No license was required as a prerequisite to marriage in this State in 1858, or prior to April 1, 1893." *White* v. *White* (Cal.), 23 Pacific 276 (1890), is also directly in point.

(n) *Michigan.*—In this State we have the great case of *Hutchins* v. *Kimmell.*[1]

The opinion is a very learned one, and does not appear ever to have been questioned in that State.

The statute in Michigan regulating the solemnization of marriages, and existing at this time, was enacted in 1838. It reads as follows:

"In the solemnization of marriages no particular form shall be required except that the parties shall solemnly declare, in the presence of the magistrate or minister and the attending witnesses, that they take each other as husband and wife. *In every case there shall be at least two witnesses, besides the minister or magistrate, present at the ceremony.*

"No marriage solemnized before any person professing to be a justice of the peace or a minister of the gospel shall be deemed or adjudged void, nor shall the validity thereafter in any way be affected on account of any want of jurdisdiction or authority in such supposed justice or minister: *Provided,* that the marriage be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage."

The action was brought by Kimmell against Hutchins for criminal conversation with the plaintiff's wife. The marriage was alleged to have taken place in Wurtemburg, and the evidence of it consisted in certain certificates from officials of that country, to which was added one from the American consul; but these were objected to because there was no proper and legal showing of what was the law of Wurtemburg, on the subject of marriage, and consequently it did not appear that the ceremony perfected a legal marriage.

Upon these facts Judge Cooley said:

"Had the supposed marriage taken place in this State, evidence that a ceremony was performed ostensibly in celebration of it, with the apparent consent and coöperation of the parties, would have been evidence of a marriage, even though it had fallen short of showing that the statutory regulations had been complied with, or had affirmatively shown that they were not. *Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time on lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon parties,* and which would subject them and others to legal penalties for a disregard of its obligations. This has become the settled doctrine of the American courts, the few cases of dissent or apparent dissent being borne down by a great weight of authority in favor of the rule as we have stated."

Judge Thornton said in that case: "Prior to the adoption of the Civil Code in this State, consent alone constituted marriage."

In the notorious Sharon divorce case, 16 Pac. 345, no marriage was found, because the parties had simply lived together as man and mistress, although they had agreed in writing to be husband and wife.

[1] 31 Mich. 126, 18 Am. Rep. 164 (1865), by Judge Cooley.

So far this would appear to be *obiter*, but after thus declaring what the law of Michigan is, the court proceeds to apply that law to Wurtemburg, saying:

"A formal ceremony of marriage, whether in due form or not, must be assumed to be by consent, and therefore *prima facie* a contract of marriage *per verba de presenti*. *Fleming* v. *People*, 27 N. Y. 329. And when the local law is not shown, the argument in its favor is, that marriages between parties capable of contracting it is of common right, and valid by a common law prevailing throughout Christendom. Regulations restrictive of this right, or imposing conditions upon it, a e exceptional; they depend on local statutes, and, as in other cases of exceptions, if one claims that a case falls within them, the burden is upon him to show the fact."

This ruling was approved in the subsequent case of *Peet* v. *Peet*.[1]

It is noticeable that in neither of these cases does Judge Cooley seem to regard the above mentioned statutes as raising any question, but seems to assume as a matter of course that they are to be construed as directory, *and thereby serve the only purpose for which they were ever enacted—to give publicity to marriages and furnish record evidence thereof—without destroying the common-law right.*[2]

(o) *Missouri.*—In Missouri, the latest decision on this subject is *State* v. *Bittick*.[3]

The facts in this case were that Bertha A. Bice and H. J. Bittick desired to marry; but the former being under age and her mother refusing consent, they were unable to obtain a marriage license. Determined not to be thwarted in their design, they went to a neighbor's house, and there, in the presence of over twenty persons, they stood up in the parlor and agreed to be man and wife, at the same time signing a written contract to that effect. The marriage was held to be valid.[4]

[1] (Mich.) 18 N. W. 220 (1884). Judge Cooley also decided that case, saying: "An actual ceremony of marriage is not essential to the establishment of the relation of husband and wife; it is sufficient that a man and a woman of due competency, and in respect to whom no impediment exists, consent to take each other as husband and wife, and actually cohabit as such," citing *Hutchins* v. *Kimmell*.

[2] See also the late case of *Flanagan* v. *Flanagan* (Mich.), 81 N. W. 258 (1899).

[3] 103 Mo. 183, 23 Am. St. Rep. 869 (1890).

[4] "There are two propositions," says the court, "conclusively settled in this State by the cases above cited: 1. That prior to the adoption of the statute in 1881, requiring a marriage license before any one authorized by the statute could perform the ceremony, a marriage according to the common law was valid in this State, though not in conformity to the statute; 2. In the interpretation of statutes on the subject of marriage, a common-law marriage is good, though not in conformity to the statutory requirements, unless the statutes contain express words of nullity. And we may add that this rule of interpretation has been adopted in nearly all of the

It may add weight to this opinion to know that the court expressed itself as being personally opposed to the policy of allowing common-law marriages, but that the law and authorities would not warrant it in finding otherwise.[1]

(p) *Nevada.*—By the Nevada court this question was considered in the case of *State* v. *Zichfeld.*[2]

The case was upon an indictment for bigamy. The facts were that in 1893 Zichfeld was married by written contract to Sophia Hoser, without the presence of any authorized official. They separated in 1895, and Zichfeld, knowing that she was still alive, was formally married to another woman.

No contention was made as to the sufficiency of those facts to constitute a common-law marriage, but the defendant claimed that the Nevada statute had superseded the common-law. But the court held otherwise.[3]

(q) *Illinois.*—The latest case from Illinois is *Hiler* v. *People.*[4] This

American States. . . . The first section of this act (Sess. Acts, 1881, p. 161) provides that 'previous to any marriage in this State, a license for that purpose shall be obtained from the officer herein authorized to issue the same.' . . . But there are no words in the act declaring a marriage not in conformity to the statute null and void. . . . If the law-making power had desired to make common-law marriages void, all that was required was to add to the first section of the act of 1881 these words: 'And all marriages entered into without a license shall be void.' This was not done, and hence we must conclusively presume that it was intended that that act should be interpreted by the rule then in force, as declared by this court."

[1] See also the prior case of *Dyer* v. *Brannock*, 66 Mo. 391, 27 Am. Rep. 359 (1877), a case in which the question was directly presented, and the common law marriage sustained, notwithstanding the statute.

[2] 23 Nev. 304, 34 L. R. A. 784 (1896).

[3] "Although this act," says the court, "contains provisions requiring a license, directing how and by whom marriages may be celebrated, or by whom persons may be joined in marriage, and prescribing other regulations in reference thereto, *the statute contains no express clause of nullity*, making void marriages contracted by mutual consent, *per verba de presenti*, except a prior license is obtained, or solemnization had in accordance with its provisions." The court quotes extensively and with approval from the opinion of Justice Strong in *Meister* v. *Moore*, 96 U. S. 76, and also from Bishop on Marriage, Divorce and Separation.

"Our statute," continues the court, "does not expressly, nor by necessary implication, as we view it, render a marriage had in disregard of its prescribed formalities void. We are to presume that the legislature knew that marriages by contract are valid at common law; that they have thus been entered into from time immemorial, and are liable to continue to be so contracted. And if the legislature intended to prohibit such marriages and render them void, and thus entail upon parties conscious of no wrong-doing, and their children, such evil consequences as must necessarily result therefrom, it would have expressed such intent in such words as need no construction, and about which a layman could have no doubt, and could thus have given due notice to all of the invalidity of informal marriages, entered into simply by contract."

[4] 156 Ill. 511, 47 Am. St. Rep. 221 (1895.)

was a prosecution for bigamy; the facts being that John T. Hiler and Lizzie Myers agreed, September, 1893, to be husband and wife, there being no witnesses, license, nor celebrant. They immediately began to cohabit, and hold themselves out to the world as husband and wife. This continued for only a few months, when in February, 1894, Hiler was formally married to Grace Washburn.

Hiler's defense was the invalidity of the first marriage, and the court sustained the defense, because of the insufficiency of the evidence, saying at the time that,

"Under the decisions of this court, a marriage legal at common law is recognized as valid and binding in this State. What constitutes such common-law marriages legal and valid has been recognized by repeated adjudications."[1]

It will be seen that the court clearly admits the validity of a common-law marriage in that State, and places its decision purely on the insufficiency of evidence. The statute is quoted in the foot-note.[2]

It would seem that the latter clause of the statute would raise a presumption that a license was absolutely necessary, no less strong than the presumption raised by the qualifying clause of the Virginia statute, that it was intended to be mandatory, and yet the Illinois court in this case, and also in *Port* v. *Port*[3] and *Hebelthwaite* v. *Hepworth*,[4] held that a marriage valid at common-law would be valid in Illinois, even though no license was obtained, for there is no clause in the statute expressly or by implication declaring that such marriage would be void. It will be seen that this construction has been almost universally adopted by the courts.

(r) *Indiana.*—The case of *Teter* v. *Teter*[5] is a most interesting illustration of what the consequences of a statute abolishing common-law marriages would be. The statute of Indiana on this subject is similar to that of Virginia—requiring a license for a marriage; providing that certain persons shall be authorized to perform the ceremony; and expressly providing further that a marriage shall not be void because solemnized by a person not legally authorized to perform

[1] *Hebelthwaite* v. *Hepworth*, 98 Ill. 126; *Port* v. *Port*, 70 Ill. 484; *Cartwright* v. *McGown*, 121 Ill. 388, 2 Am. St. Rep. 105.

[2] "Persons intending to be joined in marriage shall, before their marriage, obtain a license from the county clerk of the county where such marriage is to take place, *anything in any general or special law of this State to the contrary notwithstanding.*"

[3] *Supra.*

[4] *Supra.*

[5] 101 Ind. 129, 51 Am. Rep. 742, (1884).

it, if the parties to the marriage, or either of them, believe they are lawfully married.

The facts in this case were that—

Wm. H. Clayton and Mrs. Hannah A. Teter, a widow, entered into a contract of marriage, and on the 18th day of May, 1871, a license was obtained from the clerk and a marriage duly solemnized. Clayton had been formerly married, but he believed, in good faith, that the former marriage had been dissolved, and there were reasonable grounds for this belief. Mrs. Teter believed that there was no impediment to the marriage between her and Clayton, and the evidence leads to the inference that she died in that belief. The parties lived and cohabited together as husband and wife; they were so regarded by the community; they so held themselves out; a mortgage was executed by them as husband and wife; a child, the appellee, was born to them in October, 1874, received his father's name, and was always recognized as the child of lawful wedlock. In September, 1871, a few months after the second marriage, Clayton's former wife did obtain a decree of divorce.

The second wife died, and then there arose a controversy between the father and son as to the inheritance of her real estate—in which the validity of the second marriage was the chief point of inquiry. The court held the second marriage valid.[1]

(s) *New York.*—In this State there is a line of decisions extending from 1809 to 1899, all sustaining the validity of common-law marriages, as generally understood in this country; with the sole exception of *Cheney* v. *Arnold*,[2] which, while admitting the validity of a marriage *per verba de presenti*, repudiated the doctrine that marriage could be established *per verba de futuro cum copula*. This case stands by itself, though, and, as pointed out in Mr. Freeman's note,[3] it has received very slight recognition abroad. That direct point has not arisen again in New York since this decision.

The latest statute which we have been able to find from New York on this subject was enacted in 1859, and contains the following clause:

[1] Elliott, C. J., saying: "We said when this case was last here, that little, if any formality was required in the marriage ceremony, and we now say that no formal ceremony is necessary, and that if the motives are good, the intention to effect an immediate marriage is present, and the purpose to unite as husband and wife, exists in the minds of both parties, mutual consent is all that is required."

[2] 15 N. Y. 345, 69 Am. Dec. 609 (1857).

[3] 69 Am. Dec. 615.

"In every case there shall be at least one witness besides the minister or magistrate present at the ceremony."

But in 1889 the New York court decided[1] in a case in which the point was directly in issue, that—

"A present agreement between competent parties to take each other for husband and wife constitutes a valid marriage, even if not in the presence of witnesses. (*Clayton* v. *Wardell*, 4 N. Y. 230; *Caujolle* v. *Ferrie*, 23 N. Y. 554; *Brinkley* v. *Brinkley*, 50 Id. 184, 197.) Such marriage may be proved by showing actual cohabitation as husband and wife, acknowledgment, declarations, conduct, repute, reception among neighbors and the like."[2]

(t) *New Jersey.*—The case of *Applegate* v. *Applegate*[3] is interesting, because in that case a marriage, solemnized with all the requirements of the statute, was made to yield to a prior consensual marriage with no formalities whatsoever.

Here, by a peculiar coincidence, we have in the same case a valid marriage which was illegal (*i. e.* not according to the statute), and a marriage celebrated with all the forms of law which was invalid.[4]

(u) *Minnesota.*—We have not access to the statute of Minnesota, but it is well settled that common law marriages are held to be valid in that State.[5]

The case of *State* v. *Lowell*[6] construes the statute so far as it relates to the age at which parties shall be capable of entering into matrimony.

It appears in that case that Alexander W. Scott, aged 32 years, and Sadie Lowell, aged 13 years and 11 months, were married without the consent of the latter's parents. Cohabitation as husband and wife followed immediately, but on the next day the father went to Scott's house and forcibly took his daughter away against her will and forcibly detained her.

[1] *Gall* v. *Gall*, 114 N. Y. 109.

[2] The following cases are directly in point: *Clayton* v. *Wardell*, 4 N. Y. 230; *Rose* v. *Clark*, 8 Paige, 574; *Fenton* v. *Reed*, 4 Johns. 51; *Jackson* v. *Claw*, 18 Johns. 346; *In Re Taylor*, 9 Paige, 611; *O'Garra* v. *Eisenlohr*, 38 N. Y. 296; *Brinkley* v. *Brinkley*, 50 N. Y. 184; *Hynes* v. *McDermot*, 82 N. Y. 41; *Badger* v. *Badger*, 88 N. Y. 546; *Atlantic City Ry. Co.* v. *Godwin* (N. Y.), 42 Atl. 333.

[3] (N. J.) 17 Atl. 293.

[4] See also *Voorhees* v. *Voorhees*, 46 N. J. Eq. 411, 19 Am. St. Rep. 404 (1890). Although upon the evidence in that case the court held that no marriage had been established, yet it stated the law of New Jersey to be that "Marriage is a civil contract, and no ceremonial is indispensably requisite to its creation. A contract of marriage made *per verba de presenti* amounts to an actual marriage, and is valid."

[5] *Re Estate of Hulett*, 66 Minn. 327, 34 L. R. A. 384; *State* v. *Worthingham*, 23 Minn. 528; *State* v. *Lowell* (Minn.), 80 N. W. 877 (1899).

[6] *Supra.*

Thereupon her husband sued out a writ of *habeas corpus*. The marriage was declared valid, notwithstanding the wife was within the statutory age.[1]

(v) *Texas.*—This State is the source of a number of well considered cases on the subject of common-law marriages, and it is settled beyond question that such marriages are valid there, notwithstanding not entered into in conformity to the statute.[2]

(w) *Kansas.*—Probably one of the most striking cases, exemplifying the evil effects of a rule abolishing common-law marriages and rendering marriage purely statutory, is the one most recently decided by the Kansas Court.[3]

The controversy arose over the title to a quarter-section of land, claimed by Thomas Schuchart as the son and only heir of Jacob Schuchart, who died in December, 1896; while the defendant claimed it on the ground that she was the lawful wife, and is now the widow, of Jacob Schuchart, deceased. Schuchart had been married early in life to plaintiff's mother, but it appears that she had died in 1891. Subsequently Jacob Schuchart entered into the marriage relation, observing all the forms and regulations of the statute, with Agnes Porteous,

[1] "The common law," says the court, "established the age of consent to the marriage contract at 14 years for males and 12 years for females, but our statute (Gen. St. 1894, sec. 4769) provides 'that every male person who has attained the full age of 18 years and every female who has attained the full age of 15 years, is capable in law of contracting marriage, if otherwise competent.' But the statute does not declare that if a marriage is entered into when one or both of the parties are under the age limit prescribed, the marriage shall be void. It does, however, impose restrictions and penalties upon public officers and clergymen, for the purpose of preventing, so far as possible, such marriages being solemnized; *but the statute has, for wise reasons, stopped short of declaring such marriages void.*"

[2] The following is the language of the court in *Ingersoll* v. *McWillie* (Tex.), 30 S. W. 56:

"Our statutes provide that certain ministers and officers shall be authorized to solemnize the rites of matrimony, that license shall issue, that such license shall be returned and recorded; and prohibitions are placed upon marriages in certain degrees of relationship, and between certain nationalities. . . . .

"Our decisions have usually been broad and liberal upon the subject, and are in harmony with the rule that marriage may be valid and binding upon the parties, although entered into not in accordance with the terms of the statute requiring license and solemnization by a minister or officer."

The question was also directly in issue in *Simmons* v. *Simmons* (Tex.), 39 S. W. 639 (1897), in which Judge Williams said:

"It is now definitely settled in this State that a marriage according to the common law is valid whether the statutory regulations on the subject are observed or not. *Chapman* v. *Chapman*, 88 Tex. 641, 32 S. W. 871; *Ingersoll* v. *McWillie* (Tex.), 30 S. W. 56; *Holder* v. *State* (Tex.), 29 S. W. 793; *Cumby* v. *Henderson*, 6 Tex. Cr. App. 519. 25 S. W. 673. To constitute such a marriage, it requires only the agreement of the man and woman to become then and thenceforth husband and wife."

[3] *Schuchart* v. *Schuchart* (1900), 60 Pac. 311.

who had formerly been married to one Porteous, from whom she had not heard in about 17 years, and from whom she had gotten a divorce before marrying Schuchart, lest perchance he might still be alive. This divorce was obtained on September 10, 1894, and the parties, overlooking the statute-law of the State providing that the marriage relation is not effectually dissolved until the expiration of *six months from the date of the decree of divorce,* procured a license and were married within less than three months. They publicly acknowledged each other as husband and wife, assumed marriage rights, duties, and obligations, and were generally reputed to be husband and wife in the community. The plaintiff himself visited them and treated them as husband and wife, until he heard of the statutory disability which existed when the ceremony was performed.

Can there be any doubt as to how such a case should be decided? Everything in the evidence indicates purity of purpose and good faith in forming the relation, and after the impediment was removed (by the expiration of the six months period) it is manifest that there was present in the minds of the parties that mutual consent, spoken in their daily conduct, which gives validity to marriages in cases where there is no formal solemnization.

The Kansas statute, however, provides that,

"The marriage relation shall ONLY be entered into, maintained, or abrogated, as provided by law."

The question now was—did that statute abrogate the common-law in this respect?

The reader will doubtless be glad to hear that the court held that *it did not,* and that the marriage was held to be good.[1]

[To be continued.]

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[1] This case was preceded by the following cases, all maintaining the same rule as above laid down: *Renford* v. *Renford* Kan.), 56 Pac. 534; *Shorten* v. *Judd* (Kan.), 55 Pac. 286; *Matney* v. *Linn* (Kan.), 54 Pac. 668; and *State* v. *Walker* (Kan.), 13 Pac. 279, the latter being peculiarly interesting and instructive.